No. 3007.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Plaintiff in Error,

vs.

WILLIAM LANGE, JR., and J. U. HASTINGS,

Defendants in Error,

and

WILLIAM LANGE, JR., and J. U. HASTINGS,

Plaintiff in Error,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Defendant in Error.

Reply Brief of Western Union Telegraph Company, Both on the Principal Question and Also on the Claim for Interest

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REPLY BRIEF OF WESTERN UNION TELEGRAPH COMPANY, BOTH ON THE PRINCIPAL QUESTION AND ALSO ON THE CLAIM FOR INTEREST.

We respectfully contend that the judgment should have been for the defendant below.

THE SCOPE OF THE INQUIRY ON THE WRIT OF ERROR.

Defendants in Error claim that the Court cannot review the evidence because there was no "motion for

judgment" in its favor at the conclusion of the trial. The authorities cited by counsel, however, relate to the cases of general findings. In this case, special findings of fact were requested and made. The assignments of error charge that in many material particulars the findings are not supported by the evidence, but the chief basis of the appeal is that the special facts found entitle the defendant below to judgment in its favor.

I.

THE CHARACTER OF THE CONTRACT RELATING TO THE SALE OF THE STOCK.

The whole question here is this: Could Pitt and Campbell in the case of non-payment, maintain an action upon the contract to collect the amount due? Plaintiffs claim that the rights of Pitt and Campbell ceased when the purchasers failed to make the payment. But the right to have the payment made was the only affirmative right which Pitt and Campbell had under the contract. If they did not possess this right, then they had no rights which could cease or determine upon the failure to pay, except the right to receive stock, which, it must be admitted, did not cease on default in payment. The plain meaning of the clause is that if, upon failure to pay, they take back the stock, which the bank is authorized to return, *then* the right of Pitt and Campbell to have these payments made would cease and determine. In other words, if the contract were an option only, the vendors

had no rights to cease or determine at any time. This would be true if the contract provided only that Pitt and Campbell agreed to sell; and contained no covenant to buy. But if Pitt and Campbell had no right to enforce the payments provided for, then the agreement of Lange and Hastings "to buy, take and receive" the stock and pay the price agreed upon, had no significance and was entirely without meaning.

Plaintiffs state, however, that they agreed to buy "upon terms and conditions." But in all contracts where the seller agrees to sell and the buyer to buy, and the price and terms and conditions are stated, the contract is made upon those terms and conditions. It adds nothing to the meaning of the agreement to state that it is made upon those terms.

THE CONSTRUCTION OF THE FORFEITURE CLAUSE.

There is no question about the rule where the contract provides that in case of default the rights of the *purchaser* only is to cease, or where it provides that the *vendor* only is to be released from all obligation. We have not referred to any of such cases. But what is the rule where the contract provides that both parties are released, or their rights cease, or that the contract is to be null and void and of no effect in law, as the clause is variously phrased? There is but little conflict in the cases upon this question. Among the authorities cited by the Defendants in Error, but one only seems to have any application; that is the case of

Ramsey v. *West,* decided by an intermediate court of appeal in Missouri. And yet the forfeiture clause of the contract under consideration in that case differed in a very material respect from the Lange and Hastings contract involved here, because in that case the parties were to be released upon default in payment, whereas we contend that no such interpretation can be put upon the Lange and Hastings contract, which seems clearly to provide, and especially in view of the positive agreement to buy which is not found in option contracts, that the rights of the parties were to cease and determine, not when the purchasers made default, but when, after default, the sellers, abandoning their right to enforce payment, retook the stock. That, we say, is the clear meaning of the words of the contract and "*thereupon* all rights of each of the said parties shall forever cease and determine." The stock could not be returned "automatically" as counsel say. Pitt and Campbell had the right to demand its return because that right was given them by the law and the contract.

The quotation from counsel's brief in the case of

Beckwith-Anderson v. *Allison,* 26 Cal., 473,

is misleading. The Court, by looking at page 474, where the terms of the contract are stated, will see that Davidson, the purchaser, never in any manner agreed to buy the property, and that none of the

parties even contended that this contract with Davidson was any more than an option.

In

Verestein v. *Yeany,* 210 Pa., 109,

the Court says (See p. 21 of counsel's brief) that under the terms of the agreement; "They (the purchasers) are to be released from liability." As to the cases of

Gordon v. *Swan,* 43 Cal., 564, and
Williamson v. *Hill,* 154 Mass., 117,

as stated in our former brief, page 36, there was no agreement to buy made by the purchasers, but the contract in each case was clearly one of option.

THE CASES CONTRA.

On the other hand, the Supreme Court of the United States in the case of

Stewart v. *Griffith,* 217 U. S., 223,

in considering the effect of a forfeiture clause providing that upon non-payment the contract was to be null and void and of no effect in law, gave controlling effect to the question whether the contract contained a clause *by which the purchasers had agreed to buy and pay the price named,* and held that where the contract so provided instead of containing merely an agreement to sell upon the conditions specified, the agreement was absolute and payment could be enforced.

The Supreme Court of Pennsylvania took the same view in the case of

> *Weaver* v. *Griffith,* 210 Pa., 13,
> (See former brief, p. 32).

We agree that the correct rule is stated in

> 2 *Warvelle* v. *Vendors,* p. 818,

where it is said:

> "The right to declare a forfeiture is derived from the stipulation of the bond or agreement for conveyance, and is reserved ordinarily as an option on the part of the vendor, who upon failure of the vendee to comply with its terms may elect to declare the contract at an end."

But the fact is, the Plaintiff in Error in this case is not dependent upon the law of those cases, which do, however, state the prevailing rule, because, as above stated, the contract with Pitt and Campbell provided that the rights of the parties were not to cease upon default in payment, but upon return of the stock.

Counsel at the oral argument contended that the nature of the property which was the subject matter of the contract should be considered, from which they claimed it would appear the purchasers never contemplated that they were entering into an agreement to buy. But if this were true, it was inadvisable to insert in the contract the absolute agreement to buy in the form it was stated.

II.

Counsel further contend that the Finding No. XVII that Lange and Hastings abandoned the contract and forfeited the previous payment, was in effect a finding that Pitt and Campbell had taken back the stock. But this is not so. If we assume that the contract was an absolute agreement to buy and the purchasers broke the contract and failed to make the payments, it would follow in any event that previous payments would be lost or forfeited. There would certainly be no way by which they could be recovered. Counsel cites from apt authority to show this in the case of

Glock v. *Howard,* 123 Cal., 1,

> "The law itself works the forfeiture of the money already paid on a contract such as that now under discussion, even in the absence of the express provision therefor."

But if, as stated, we assume, for the purpose of the argument, that the contract is absolute, the finding that Lange and Hastings had abandoned it, would not be a finding that Pitt and Campbell had abandoned it or surrendered their right to enforce payment. There is nothing in the record to show that Pitt and Campbell never asserted a claim or ever permitted the statute of limitations to run, or had or had not taken any action to enforce payment, or that they had received the stock. There is no finding nor evidence nor alle-

gation that Pitt and Campbell ever surrendered their right to enforce the contract.

But if Pitt and Campbell had elected to retake the stock, which is not shown, affirmatively or by inference, it could have made no difference in the case. The liability of the telegraph company was fixed, or not at the time of the payment complained of on April 30th. The stock could not be returned till July 2nd, because there was no default in payment until that date. The claim on which this action was founded was made June 26, 1907, before there was any default, and before the stock could have been returned (Tr., p. 11, par. IX). The liability of the telegraph company can not be made to depend upon the election of Pitt and Campbell at a subsequent time to accept the stock when under the terms of the contract they were not required to accept it. So the controversy reverts to the original question, Were Pitt and Campbell given the right by the terms of the contract to enforce the payment provided for therein?

RECOVERY OF MONEY PAID UNDER MISTAKE.

Furthermore, if the money was paid under a mistake by reason of the delay of the message, as claimed by plaintiffs in the action, there was nothing to prevent its recovery from Pitt and Campbell, and the damages, if any at all, would have been the expense of the prosecution of such action. There was no

change in the position of the parties. The authorities abundantly sustain this proposition.

> *Crocker Woolworth Bank* v. *Nevada Bank,* 139 Cal., p. 964 (see specially pp. 570, 571, 572);
> *White* v. *Stevenson,* 144 Cal., 110;
> 30 *Cyc.,* 1318.

Counsel argues (page 31 of his brief) that if the word "thereupon" used in the forfeiture clause of the contract refers to the return of the stock and not to the default in payment, then by analogy the word "theretofore" used in connection with the forfeiture of previous payments, must also relate to the return of the stock, and therefore any moneys which should come to the possession of the bank after the time they were actually due, would be forfeited to Pitt and Campbell. This is neither convincing nor true. Under no circumstances could such money be forfeited. If a sum of money representing a payment which was due on May 1st, should have come to the possession of the bank on May 2d, it would have been either a payment or not. If it was a payment and accepted as such by the parties, then it could not have been forfeited because there would have been no default. If it were not a payment, it could not have been forfeited for the obvious reason that only payments under the contract which had been actually made were to be forfeited. If such money were not a payment it would not be forfeited.

III.

On our contention that even if the contract were originally one of option, this option was accepted and the purchasers' obligation became absolute when they mailed the draft to apply as payment, counsel replies that the payment under the contract was to be made in gold coin and not in drafts. But this is beside the question. The offer which was open to purchasers could be accepted by them without making any payment at all until the payment became due. We were not discussing in that connection (though we did in another branch of the case) the question whether the draft was a payment in the proper medium, but we do contend that as it was sent, as alleged in the complaint (Tr., pp. 6 and 8) for the purpose of making payment and as the letters of transmission (Tr., pp. 87 and 88), stated that it was to meet the payment due, plaintiffs thereby accepted the offer and became obligated to make the payment provided by the terms of the contract. While we contend that this was the obvious effect of the mailing of the draft and sending the letters of transmission, yet we earnestly insist that the absolute obligation of Lange and Hastings to purchase the property was created upon the execution of the original agreement and not upon the subsequent acceptance of the offer and mailing of the draft.

IV.

THE STIPULATIONS ON THE TELEGRAPHIC BLANK RELATING TO DELAYS IN DELIVERY AND INSURANCE OF MESSAGES.

The finding of the Court is that the delay in the delivery of the message occurred before the message reached Wabuska, which was an intermediate point and the terminus of the Western Union Company's lines (Finding No. XV, Tr., p. 58). The Stipulation of Facts admits that the message filed in Oakland at 8:50 P. M. reached Reno, Nevada, prior to the hour of 9:30 P. M. of the same evening (Tr., p. 70). The undisputed fact of the case, therefore, is that the delay complained of occurred at an intermediate point. Does the stipulation under which the message was transmitted apply to such delays, and, if so, is such stipulation valid? The authorities on this subject are reviewed at length in the very rceent case in the Supreme Court of California, of

> *Union Construction Co.* v. *Western Union Tel. Co.,* 163 Cal., 298,

referred to in our former brief. Upon a review of the principal cases the Court there concludes as follows:

> "For these reasons it (the stipulation) should be interpreted to provide only for *delays* and mistakes occurring in the forwarding of a message

from the company's desk where it is received from the sender to the company's office where it is written out and made ready for delivery to the addressee."

This is the doctrine of the Federal Court. The Box case and the Nichols case, referred to by counsel for defendants in error, were decided, as we will indicate, upon other grounds and upon a state of facts which the Court held practically amounted to fraud. Counsel is in error in stating that the decision in

> *Western Union Telegraph Co.* v. *Coggin,* 68 Fed., 137,

was placed upon other grounds. The damages in that case arose not from error in transmission but from *delay.* In the statement of the case, beginning at the second paragraph, on page 138, the Court says:

> "The plaintiffs alleged the defendant negligently failed to deliver the message, and by reason thereof Farris failed to pay the $1,250 on the 24th day of July, 1892, whereby the plaintiffs were damaged."

The Court then, after referring to the decision of the Supreme Court in *Primrose* v. *Western Union* that "the measure of damages for mistakes in its transmission *or delivery or for its non-delivery, is the sum paid for sending it,"* says:

> "The decision of the Supreme Court in *Prim-*

rose vs. *Telegraph Company* silences further contention on these questions in the Federal Court."

Counsel for Defendant in Error cites the cases of

> *Box* v. *Postal Tel. Co.,* 163 Fed., 138;
> *Postal Tel. Co.* v. *Nichols,* 159 Fed., 643;
> *Fleischner* v. *Pac. Postal Tel. Co.,* 55 Fed., 738,

to show that the stipulation of the message blank referring to delays is void. In the cases cited, the gravamen of the complaint was, not the invalidity of the stipulation, but actual fraud—in receiving important messages, knowing their importance, and at the same time knowing the company's inability to transmit the messages at all, because the lines were down, or for other reason. In the Fleischner case the lines were down, a fact which was known to the telegraph company and not communicated to the sender. In the Box case, the message was never sent at all and the company failed to notify the sender of the fact, although it knew the option the message related to would expire before morning. It is true that the Court said "the message must of course be sent before it can be repeated," but the Court did not in that case decide that the contract was void in respect to delays. On the contrary, it said (p. 141):

> "Although the regulation purports to be made against mistakes or delays, it should be construed to refer to such mistakes and *delays* and could be

corrected or avoided by repetition and comparison."

In the recent case of

> *Gardner* v. *Western Union Tel. Co.,* 231 Fed., 405,

decided by the Circuit Court of Appeals for the Eighth Circuit, the claim was based solely upon a *delay of five days* in the delivery of a message. The Court says, page 407, after setting forth the terms upon the message blank, relating to unrepeated messages:

> "The evidence showed that on account of the delay in the delivery of the message the plaintiff suffered material damage."

In this case the Court also upheld the validity of the stipulation requiring claims for damages to be presented within sixty days, notwithstanding an express provision in the constitution of Oklahoma that such provisions were void. But this case is cited to show the stipulation applies to delays in the delivery of messages, as well as to errors of transmission. This must be so. In the Gardner case, as in this, there was no error in transmission, but the damage alleged arose solely from delay. If the stipulation, as contended by counsel in this case, would not relieve the company from damages arising from the delay in the delivery of an unrepeated message, there was then

no occasion to consider the validity of the clause in the agreement that claims must be presented within sixty days.

RULING OF INTERSTATE COMMERCE COMMISSION.

In the recent case of

> *Cultra* v. *Western Union Tel. Co.,* 44 I. C. C., 679,

cited in our former brief at pages 67-71, the Interstate Commerce Commission, which has by act of Congress been given jurisdiction to determine the validity of rules and regulations of interstate companies, stated the case in this clear language relating to the assumption of risk concerning errors or *delays,* in relation to unrepeated messages. The Commission said:

> "The fundamental difference between the unrepeated rate and the other two classes of rates is that under the former the sender assumes the risk of *error or delay,* while under the latter the carrier assumes the risk in part *or entirely,* as the *case* may be; and the rules fixing the measure of the defendant's liability under these several classes of rates are essentially a part of the rates themselves."

THE ALLEGED INSURANCE OF THE MESSAGE.

Plaintiffs in this case, however, alleged and relied upon the alleged oral contract of insurance of the message. On this question there is but little to add to what is said in our former brief. Counsel contends

that the provision of the message blank for the insurance of messages must be limited strictly to the matter of transmission. This is a new interpretation of this clause of the message blank which is as old as telegraphy. What the company undertakes in the case of an insured message is to deliver the correct copy. The transmission is of no value to the sender unless the message is placed in the hands of the receiver. As stated in our opening brief, it would be but trifling with the Court for the company to attempt to escape liability upon an insured message which has been correctly transmitted but never delivered, on the ground that the insurance only related to the electrical transmission. The alleged oral contract of insurance upon which plaintiffs relied in this case and which was the basis of the Court's judgment, we contend is in direct conflict with the written agreement, of the terms of which the plaintiffs were charged with full notice. See

> *Postal Tel. Co.* v. *Nichols,* 159 Fed., 643;
> *Primrose* v. *Western Union,* 154 U. S., 1.

The terms of the written agreement are:

> "This company is hereby made the agent of the sender *without liability* to forward any message over the lines of any other Company when necessary to reach its destination."

This agreement could not be modified by a parol contract.

Counsel says this stipulation has reference only to telegraph and not to telephone lines, but there is no authority for this statement. The contract provides for the forwarding of the message, "over the lines of *any other company.*" The terms are not restricted to telegraph companies. The stipulation of Facts in this case (Tr., p. 68) recites that

> "in order to transmit the telegram in suit by telegraph or telephone beyond Wabuska, it was necessary that it be forwarded from that point over the line of the Yerington Electric Company to Yerington."

The written stipulation under which the message was transmitted provides, in relation to insurance of messages:

1st: That the contract of insurance must be *"in writing."*

2nd: That the contract shall state the *"agreed amount of risk,"* which it is not even claimed was done in this case.

3rd: That the rate of premium shall be paid as specified in this written agreement.

4th: That "no employee of the company is authorized to vary the foregoing."

As was held in the Primrose and Nichols cases, cited above, the plaintiffs were charged with notice of the terms of this agreement. None of the conditions were complied with.

It is not to be presumed that the telegraph company, having the right to make reasonable regulations and employing necessarily a large army of agents, would so limit their powers as to the insurance of transmission, and yet give them full authority without effort at restriction, to make any sort of verbal contract of insurance of delivery. It is claimed here and found by the Court that because plaintiffs said they "placed themselves in the hands of the agent," it must be presumed he had authority to insure for a premium of 45c against loss and indemnity claimed to amount to $11,250.

The rules and regulations which the law permits the telegraph company to adopt, apply alike to all those who employ its services. There is no special rule or different liability for those who send their messages upon the same blanks and under the same written stipulations, but who also claim that they "put themselves in the hands of the company."

We respectfully contend that the judgment in this case should have been for the defendant below.

BEVERLY L. HODGHEAD,
Attorney for Western Union Telegraph Company,
Plaintiff in Error.

ALBERT T. BENEDICT,
Of Counsel for Plaintiff in Error.

(We also print herewith our reply to Brief of Plaintiff in Error on the claim for interest.)

IN THE

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WILLIAM LANGE, JR., and J. U. HASTINGS,
Plaintiffs in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY, a corporation,
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THE REPLY OF DEFENDANT IN ERROR ON THE SUBJECT OF CLAIM FOR INTEREST.

If there were any merit in the contention of counsel that this Court cannot review the evidence in the case, the objection applies with equal, if not greater, force to the plaintiffs' writ of error. In fact, as to the plaintiffs' writ there does seem to be foundation for the objection. There is a general finding (No. XX, Tr., p. 61) that plaintiffs' damage was $11,250. The record shows no motion made nor special finding demanded on the subject of interest.

THE REASON PLAINTIFFS' CLAIM FOR INTEREST WAS NOT ALLOWED.

We do not deem it necessary to make full reply to the somewhat elaborate and probably over-refined argument of counsel upon plaintiffs' claim for interest, nor to analyze separately the authorities cited on the various subdivisions of this argument. The law in such cases is not intricate. The rule, as stated by the authorities is, that interest will not be allowed on unliquidated demands.

This case is a suit for damages for alleged negligence in the delivery of a telegram. Most of the cases cited by counsel are cases growing out of express contracts for the payment of money. Those on which counsel seems chiefly to rely were cited and reviewed by the Supreme Court of California in

Cox v. *McLaughlin,* 76 Cal., 60,

where it is said by the Court, at page 68, as follows:

> "These and many other cases which might be cited from New York were mainly based upon *express contracts,* in which money was to be paid, services rendered, or a duty to be performed at a fixed and certain time,—cases in which the default of the debtor at the fixed period was apparent, the amount of the recovery, and not the right to recover at all, being the sole question."

These various matters discussed by counsel were considered by the Court and the claim of interest denied because the damages, if any, which plaintiff sustained, *were not ascertained or liquidated* when the alleged act of negligence accrued, but could only be ascertained and determined by the judgment of the court from the evidence. The facts on which the Court based this ruling are as follows:

The plaintiffs had a contract for the purchase of certain shares of stock in a mine for $75,000 and, contending that they had the right to withdraw from this contract, which we deny, attempted to intercept the payment of a draft which had been forwarded to apply upon the contract. The draft, however, was received by the bank and payment was made. Plaintiffs had the right after this payment was made, if they chose to exercise it, to go on with the purchase of the property and, as we contend, were compelled to do so, but whether they were compelled to make purchase or not, defendant alleged that they were not damaged because the stock was worth more than the price they had agreed to pay therefor. The value of the stock was thus made an issue in the case, and this issue was tried along with the other issues in the cause and finding made thereon (Par. VI of Complaint, Tr., p. 34).

If, as a matter of fact, this mining stock, as alleged, was of an actual value greater than the con-

tract price therefor, and, let us assume, was selling on the stock market for such greater price, could it be said the plaintiffs were damaged by this payment? It matters not whether they were or were not required by law to go on and complete the purchase, if, as a matter of fact, they had the right to do so and by so doing would have profited by the purchase. In such case they were not damaged by the act of defendant. If, on the other hand, the stock was of no value or was worth less than the purchase price, it must be conceded that plaintiffs would have sustained damage by the payment of the draft unless the amount could be recovered from Pitt and Campbell as having been paid under a mistake. These were matters in controversy and could only be determined by the Court upon the evidence. This evidence is found in the record. The defendant in support of this defense offered the testimony of W. C. Pitt, one of the owners of the mine, and a party to the agreement, and whose evidence supported the special defense (See Tr., p. 155). In rebuttal, plaintiffs offered the evidence of two mining engineers, Ruddock and Bliss, whose expert opinions were given in opposition to the testimony of Pitt (Tr., p. 156). The Court found on this issue in favor of the plaintiffs, that the stock was practically valueless (Finding XVIII, Tr., p. 60). Not until this issue was determined could the amount

of damages, if any, be *ascertained,* and the demand be considered liquidated.

Counsel, however, invokes the rule that interest will be allowed on unliquidated claims where the amount of the damage can be determined by computation by reference to well established market values. But obviously, such was not the case here. If this stock, in the opinion of plaintiffs, was worth $75,000 in March and, as found by the Court, was practically valueless in April, it cannot well be contended that the damages could have been ascertained by reference to well established market values. The rule which counsel invokes refers to securities or commodities which have standard values, by the use of which damages can be ascertained and mathematically determined by simple computation.

If the Court had found for the defendant on this issue of value of the stock, and had ascertained that the plaintiffs, after the payment they attempted to intercept had been made, could have sold the stock for $75,000 and thus reimburse themselves, then it follows that although all other issues may have been found for plaintiffs, they would have sustained no damage.

This issue of value was determined against us upon a conflict of evidence and we are concluded thereby, but the amount of the damages could not be *ascertained* until the issue had been determined by the Court.

These are the reasons the Court declined to allow interest upon this claim.

Respectfully submitted.

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Defendant in Error.

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